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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules	)	**WT Docket No. 97-81**
Regarding Multiple Address Systems	)	
	)	

COMMENTS OF NORTHERN STATES POWER COMPANY

By:

Carole C. Harris
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005-3096
202-756-8000

Attorney for Northern States Power Company

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

In this proceeding, the Commission seeks comments to further clarify the impact of amendments, promulgated in the Balanced Budget Act of 1997, to the Communications Act of 1934 with regard to auctioning MAS spectrum. This MAS spectrum is used extensively by public safety radio service entities such as Northern States Power Company ("NSP").

With regard to the amendments promulgated in the Balanced Budget Act, they referenced the Commission's duty to avoid mutual exclusivity much more prominently than it had been referenced in previous, related legislation. Accordingly, their impact is that the Commission must now do everything it reasonably can to avoid mutual exclusivity and, hence, auctions. Included by inference within that cautionary note is Congress's intent that the Commission read broadly the exemptions from auction set forth in the amendments.

In addition to the language of the amendments militating against creating mutual exclusivity and auctioning MAS spectrum, doing so would be contrary to the public interest. The first important consideration is that the definition of "public interest" used by the Commission should include the benefits to society yielded by power utilities, such as the safe and efficient distribution of electricity. Another important consideration is that to create mutual exclusivity for MAS licenses, the Commission would have to change its longstanding system of site-by-site licensing, which is much better aligned with the reality of MAS and, thus, is a much more efficient licensing system.

Moreover, pursuant to the pertinent legislative history and the nature of NSP and similar power utilities, the public safety radio services exemption set forth in the amendments should be construed to encompass investor owned utilities such as NSP. Accordingly, the Commission is not authorized to require NSP to engage in competitive bidding for MAS spectrum.

Also, the entire 928/952/956 MHz bands, as well as twenty channel pairs in the 932/941 MHz bands, should be reserved for public safety radio services (with "public safety radio services" being as defined in the amendments promulgated in the Balanced Budget Act of 1997). Many public safety service entities that use MAS will need significant amounts of additional spectrum in the future to support and grow their systems, and the pool of available spectrum must be adequate to meet these critical public safety radio service needs.

Finally, NSP strongly urges the Commission to lift the freeze on applications for MAS spectrum. The scope of NSP's request is very limited; it only asks that the freeze be lifted for it and similar public safety service entities. NSP must have continuing access to spectrum in order to refine and expand its existing system. It also must have the ability to modify its existing MAS facilities. Without this ability on an ongoing basis, its core operations could be severely compromised, resulting in dire consequences for the public.

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Pursuant to § 1.415 of the rules of the Federal Communications Commission ("Commission" or "FCC"), Northern States Power Company ("NSP"), by its attorney, respectfully submits Comments in response to the Further Notice of Proposed Rulemaking and Order ("FNPRM") in the above-captioned proceeding.

INTRODUCTION

The FCC issued a Notice of Proposed Rule Making ("NPRM") in February 1997 to reexamine the uses of and demand for Multiple Address Systems ("MAS") spectrum. [1] One of the areas addressed by the NPRM was whether the amendments to the Communications Act of 1934 ("Communications Act")[2] promulgated in the Omnibus Budget Reconciliation Act of 1993[3] authorized the FCC to use competitive bidding to allocate MAS spectrum. Shortly after the issuance of the NPRM President Clinton signed the Balanced Budget Act of 1997 ("Balanced Budget Act"), [4] which amended Section 309(j) of the Communications Act and modified the parameters for determining whether

[1] Amendment of the Commission's Rules Regarding Multiple Address Systems, WT Docket No. 97-81, *Notice of Proposed Rule Making*, 12 FCC Rcd 7973 (1997).
[2] 47 U.S.C. § 151 *et seq.*
[3] Pub L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993).
[4] Pub. L. No. 105-33, Title III, 111 Stat. 251 (1997).

the FCC is authorized to use auctions to allocate MAS spectrum. Accordingly, the FCC issued the instant FNPRM and invited further comment on competitive bidding.

As a large user of a significant amount of MAS spectrum, NSP hereby submits its comments on the issues raised in the FNPRM. As explained below, NSP believes that the Balanced Budget Act's revision of the FCC's auction authority prohibits it from auctioning MAS spectrum in the 928/952/956 MHz bands, especially given its duty to avoid mutual exclusivity and to respect the Balanced Budget Act's exemption from auctions for all spectrum used by "public safety radio services." NSP also believes that 20 additional channel pairs in the 932/941 MHz bands should be set aside for the exclusive use of public safety radio services on a non-auctioned basis, regardless of whether MAS channels in other bands are also reserved for public safety services. Finally, NSP urges the FCC to provide an exception to the licensing freeze for public safety radio service applications which would cover applications filed by investor-owned power companies such as NSP.

BACKGROUND

Northern States Power Company is a public utility providing electricity and natural gas to approximately 1,830,000 customers in a service region spanning Michigan, Minnesota, Wisconsin, North Dakota, and South Dakota. It uses numerous resources and systems, including approximately 28,000 miles of overhead power lines, to generate, store, transmit, and distribute electricity and natural gas across a network traversing over 200,000 square miles.

The normal and safe functioning of society in NSP's service area is dependent upon NSP being able to consistently monitor, maintain, and repair its facilities and, of course, immediately pinpoint the source of emergencies such as power outages. In order to

efficiently conduct those critical activities, NSP has licensed and implemented wireless telecommunications monitoring and control systems. Specifically, NSP holds 11 MAS licenses in the 928/952/956 MHz bands. The systems are essential for remote monitoring and controlling on a real-time (*i.e.*, instantaneous) basis master control banks, meters, and other components of NSP's generation, storage, and distribution network. Much of that network is in rural areas that are prohibitively difficult to access with manned work crews. A failure to monitor and control network components on a real-time basis can result in events such as power lines overheating, catching fire, and falling down. In light of the critical activities carried out by NSP's customers, which include hospitals, police, and fire departments, not being able to employ MAS facilities could have disastrous effects. NSP's ability to deliver power to its customers in an efficient and safe manner is highly dependent on this radio system.

It is important to note that the scope of NSP's MAS system is not static. Over the past several years, the benefits of MAS have proven so great in terms of increased system reliability and cost-efficiency that NSP plans to expand its MAS operations in the near future. Such expansion will require the acquisition of additional MAS licenses.

The importance of being able to modify NSP's current MAS licenses and to apply for future MAS licenses simply cannot be overemphasized. Accordingly, NSP has a strong interest in the FCC's regulation of, and in its own continued access to, MAS radio spectrum.

DISCUSSION

I. COMPETITIVE BIDDING FOR MAS LICENSES IS CONTRARY TO THE PUBLIC INTEREST

A. The New Reference to Section 309(j)(6)(E) in the Balanced Budget Act Indicates Congress Heightened the FCC's Obligation to Avoid Mutual Exclusivity and Auctions for MAS Licenses.

The FCC's authority to use competitive bidding to issue licenses is limited to those situations in which mutually exclusive applications are received for an initial license or construction permit. The FCC's authority to use competitive bidding initially was granted through the Omnibus Budget Reconciliation Act of 1993, which required the FCC to "continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in applications and licensing proceedings."[5]

As noted in Paragraph 17 of the FNPRM, in the 1997 Balanced Budget Act Congress again made explicit reference to the FCC's obligation to avoid mutual exclusivity and auctions in the opening clause of an amendment revising the parameters of the FCC's auction authority.[6] In that clause, Congress directly calls attention to the statutory mandate that the FCC "continue to use engineering solutions, negotiation . . . ."[7] It is of compelling significance that when promulgating new legislation revising the FCC's auction authority, Congress referenced the obligation to avoid mutual exclusivity and hence auctions in a more prominent position in the legislation and gave it stronger

[5] 47 U.S.C. § 309(j)(6)(E).
[6] 47 U.S.C. § 309(j)(1) (1998).
[7] 47 U.S.C. § 309(j)(1) (1998).

emphasis. Clearly, Congress is more concerned than ever that the FCC avoid auctions where mutual exclusivity does not exist.

An additional indication of Congress's intent in this regard is found in the House Conference Report to the Balanced Budget Act.[8] There, concern was expressed that in implementing its new auction authority, the FCC might minimize its obligations under Section 309(j) and overlook the "tools that avoid mutual exclusivity."[9] The new reference was clearly intended as a cautionary sign to the FCC to use auctions only as a last resort.

The impact of the new reference to Section 309(j)(6)(E) is that now it is even clearer that establishing mutual exclusivity as a predicate to holding auctions for MAS spectrum used by private entities is inappropriate. Furthermore, the spirit of Congress's heightened intention to keep auctions to a minimum carries over to how the FCC should construe the exemptions from auction enumerated in Section 309(j)(2).[10] As explained further below, an appropriate reading of Section 309(j)(2)(A), which prescribes the exemption for "public safety radio services," would include utilities which currently hold or plan to seek MAS licenses. Accordingly, both Section 309(j)(6)(E) and Section 309(j)(2) militate against the FCC's tentative conclusion that auctioning MAS spectrum licenses to private entities is in the public interest.

B. Other Factors Support Avoiding Mutual Exclusivity and Auctions for MAS Licenses.

1. The Term "Public Interest" Must be Defined to Include Benefits Provided by Utilities.

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[8] H.R. Conf. Rep. No. 105-217, 105th Congress, 1st Sess. (1997).
[9] H.R. Conf. Rep. No. 105-217, 105th Congress, 1st Sess., at 572 (1997).
[10] 47 U.S.C. § 309(j)(2) (1998).

As an initial matter, Section 309(j)(6)(E) obligates the FCC to avoid mutual exclusivity, the predicate to its ability to auction spectrum, when it is in the public interest to do so. The term "public interest" should not be narrowly defined or limited to the express language of the public interest "goals" enumerated in Sections 309(j)(3)(A)–(D) of the Communications Act.[11] The FCC's obligation under Section 309(j)(6) extends to public interest concerns that may not be specifically or directly enumerated in Sections 309(j)(3)(A)–(D). This is evident from the language of Section 309(j)(6), which references "the public interest" without limiting or further defining its scope. Furthermore, the FCC's obligation under Section 309(j)(3) is set forth within that statute in the conjunctive form; Section 309(j)(3) provides that the FCC "shall include safeguards to protect the public interest...and shall seek to promote [the objectives set forth in Section 309(j)(3)(A-D)]." (Emphasis added.)

While the public interest benefits yielded by the private radio service users of MAS spectrum may be inferentially contained in Sections 309(j)(3)(A)–(D), they are not expressly stated therein. Rather, those benefits are less quantifiable and tangible. They

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[11] Section 309(j)(3) provides that the goals are:

(A) the development and rapid deployment of new technologies, products, and services for the benefit of the public, including those residing in rural areas, without administrative or judicial delays;

(B) promoting economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women;

(C) recovery for the public of a portion of the value of the public spectrum resource made available for commercial use and avoidance of unjust enrichment through the methods employed to award uses of that resource;

(D) efficient and intensive use of the electromagnetic spectrum.

are, nonetheless, extraordinarily important; quite simply, society as we know it would be critically jeopardized if power companies such as NSP lose their ability to effectively and efficiently monitor and remotely control their lines. Therefore, in analyzing whether competitive bidding on MAS licenses is in the public interest, the FCC must employ a definition of public interest that takes into account the unique nature of power utilities.

2. The Public Interest Would Not be Served by Instituting Auctions for MAS Licenses.

As the FCC recognized in a related Notice of Proposed Rule Making issued in March 25, 1999,[12] the current licensing framework that governs private radio services, which includes MAS, "generally does not result in the filing of mutually exclusive applications because the frequencies are intensively shared, assigned on a first-come, first served basis, and /or subject to frequency coordination."[13] Accordingly, the FCC would have to implement a new licensing scheme in these services in order to meet the threshold condition triggering the FCC's authority to auction. Conversely, in order to "avoid" mutual exclusivity, the FCC need not do anything.

Based on the fundamental nature of MAS, the FCC cannot find that it is in the public interest to institute auctions. The FCC acknowledges as much in its conclusions concerning the Balanced Budget Act's "public safety radio service" exemption. As set forth above, the current licensing framework for MAS would have to be changed in order to establish mutual exclusivity. In inviting comment on the ramifications of the public

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[12] In the Matter of Implementation of Sections 309(j) and 337 of the Communications Act of 1934 as Amended, Promotion of Spectrum Efficient Technologies on Certain Part 90 Frequencies, Establishment of Public Service Radio Pool in the Private Mobile Frequencies Below 800 MHz, WT Docket No. 99-87, *Notice of Proposed Rule Making*, FCC 99-52 (Released March 25, 1999).

[13] *Id.* at 13.

safety radio services exemption, the FCC expressed its belief that "it would be imprudent and potentially disruptive to current public safety communications to overhaul the existing frequency assignment approach for public safety pool spectrum."[14] The FCC is correct in this conclusion, just as a new licensing scheme would be imprudent and disruptive to MAS public safety radio services. A change to a mutually exclusive application/auction format would, at a minimum, lead to crippling uncertainty and impaired access to MAS spectrum used by public safety radio service licensees.

In order to implement a mutually exclusive licensing scheme for MAS, the FCC must determine that disruption that would be imprudent to impose on the Part 90 Public Safety Pool would be in the public interest to impose on MAS public safety service licensees. Such a determination cannot be supported.

3. Auctioning MAS Spectrum Licensed for Private Use Would Not Further the Objectives Stated in Section 309(j)(3)(A)-(D).

Section 309(j)(3) sets forth four objectives that the FCC must seek to promote as it identifies classes of licenses to be auctioned. In general, the first two objectives relate to the development and deployment of new technologies and promotion of economic opportunity and competition, as well as the ready accessibility of innovative technologies. These objectives do not appear to have direct applicability to MAS spectrum that is used by private licensees, such as in the 928/952/956 MHz bands. The third objective goes to the recovery of the value of spectrum made available for commercial use. By its terms, this does not apply to the majority of MAS spectrum users in the 928/952/956 MHz bands.

The fourth factor, efficient and intensive use of the electromagnetic spectrum, does apply to MAS. Efficient and intensive use of the electromagnetic spectrum, however,

[14] *Id.* at 39.

would not be promoted by auctions in the private services. In auctioning the 800 MHz SMR services, the FCC established a mutually exclusive application scheme for the issuance of geographic area licenses. The FCC based this action upon its determination that site-by-site licensing hindered the ability of SMRs with wide-area, digital networks to respond to consumer demand and market conditions. These considerations do not apply to MAS services.

In the March 25, 1999 NPRM, the FCC acknowledges the prevalence of site-by-site licensing in the private radio services by such users as railroads, petroleum pipelines and manufacturers.[15] NSP submits that, with few exceptions, site-by-site licensing is the only reasonable or appropriate means of licensing MAS. This is so because, unlike subscriber-based services, which are rendered to the public at large across broad market areas, public safety radio service users serve themselves over the territory in which they happen to conduct their core activities. Such territories can not be assumed to be coterminous with a specified market area. While it is reasonable to expect subscriber-based providers to conform their service areas to economic markets, it would not be economically efficient, and indeed arguably impossible, to require private safety service users to adjust their areas of operations in order to do so.

Furthermore, MAS licensing has largely been frequency-by-frequency, site-by-site because perfect frequency reuse is virtually never attained and becomes less so as spectrum grows more congested. MAS systems typically consist of a variety of discrete channels that do not lend themselves to the auction of blocks of spectrum across market areas. Accordingly, auctions of the spectrum channels will either result in substantial spectrum in

[15] *Id.* at 13.

the hands of licensees that do not need it and/or will keep spectrum from licensees that do need it. In contrast to the auction of the SMR bands at 800 MHz and 900 MHz, this would not represent a net gain in spectral efficiency or further the public interest.

The practical effect of adopting geographic area licensing and auctions would be wasted resources and inefficient use of spectrum. For example, the FCC would be required to spend resources preparing for and auctioning spectrum. Auction participants would be made to bid on one or more licenses in order to secure authority to operate in the area that meets their actual needs. To the extent that the licensee does not intend to construct and operate a system in the entire area, it would have to partition its spectrum. The FCC would then have to expend resources reviewing the partitioning applications. Following this scenario, the licensee and FCC would go through an entire series of additional steps in order to get to the same result yielded by the existing licensing scheme – licenses issued that cover the applicant's actual needs. The inefficiency associated with auctions is exacerbated by the fact that, until such time as the licensee decides to partition, the spectrum is not being used. Any other entity that may have a need for some of the licensee's spectrum is left to pursue other options.

Finally, while the Commission may be able to justify expending resources to hold auctions for spectrum intended for commercial use, the argument that using auctions will meet section 309(j)(3)'s revenue generation and unjust enrichment objectives is less compelling in the context of MAS. This is true because public safety service MAS licensees are using spectrum in order to run their businesses and this spectrum is not a direct part of their product or service offerings. In the case of NSP, the public derives value by having power systems that operate safely and reliably. Requiring payment for

spectrum used in this way could actually detract from this value because an extra cost is being imposed and this cost would probably cause some entities to forego using spectrum for similar purposes. This differs from commercial service providers that use spectrum as a critical part of the very product or service they are selling as communications entities. The spectrum is needed to generate business and, thus, revenue. It makes sense, therefore, that this subscriber-based spectrum is licensed via auction. The same cannot be said for MAS public safety service licensees that will use their systems for private, internal purposes.

NSP submits that Congress wisely reemphasized the obligation to avoid establishing mutual exclusivity in cases where it simply is not appropriate. The private MAS radio services are qualitatively different from the subscriber-based services that the FCC has auctioned previously, and yield benefits that are not easily calculable. NSP submits that after careful evaluation of the pertinent factors, and giving due heed to Congress's admonition concerning mutual exclusivity, the FCC can reach only one result: It should retain the status quo and not introduce mutually exclusive applications and auctions in the MAS spectrum at 928/952/956 MHz.

II. THE PUBLIC SAFETY RADIO SERVICES EXEMPTION PROHIBITS THE FCC FROM USING COMPETITIVE BIDDING TO ISSUE MAS LICENSES TO UTILITIES.

In Paragraphs 18 through 21 of the FNPRM, the FCC discusses and seeks comment on whether the public safety radio services exemption set forth in Section 309(j)(2)(A) of the Communications Act should apply to MAS spectrum and thus exempt it from being allocated through competitive bidding. Section 309(j)(2)(A) reads:

> (2) EXEMPTIONS—The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission—
>
> > (A) for public safety radio services, including private internal radio services used by State and local governments and non-government entities and including emergency road services provided by not-for-profit organizations, that—
> >
> > > (i) are used to protect the safety of life, health, or property; and
> > > (ii) are not made commercially available to the public;
> >
> > (B) for initial licenses or construction permits for digital television service given to existing terrestrial broadcast licenses to replace their analog television service licenses; or

The statutory scheme dictates that the FCC determine which services are potentially auctionable based on a two-fold inquiry.[16] First, the FCC should determine which private licensees Congress intended to include within the exemption from competitive bidding. Second, the FCC should define the scope of the exemption in light of the licensing scheme currently in place for exempt licensees and Congress's expressed intention to preserve access to public safety radio services spectrum.

In Paragraph 19 of the FNPRM, the FCC seeks comment on whether licensing of the 932/941 MHz and 928/959 MHz bands for MAS services comes under the public safety radio services exemption set forth in Section 309(j)(2)(A). In Paragraph 21 of the FNPRM, the FCC seeks comment on whether licensing of the 928/952/956 MHz bands for MAS services comes under the public safety radio services exemption. NSP submits that with regard to utilities that use MAS, there is no rational reason for distinguishing between the different bands for licensing purposes. Rather, utilities' use of MAS should be deemed

[16] *See NPRM* ¶ 17.

public safety radio services and, thus, exempt from competitive bidding in any of the MAS bands.

A. The Balanced Budget Act's Legislative History Makes Clear That Congress Intended to Include Utilities Within the Scope of the Public Safety Radio Services Exemption.

Congress did not expressly define in the statute the class of licensees included within the "public safety radio services" exemption. Accordingly, the FCC must look to the legislative history to discern Congress's intent and construe the exemption in a manner consistent with that intent.[17] In the House Conference Report accompanying the Balanced Budget Act, Congress stated that "the public safety radio services exemption" is much broader than the definition for "public safety services" contained in new section 337(f)(1), and included specific types of private internal radio services that fall within the exemption.[18]

According to the House Conference Report, "the exemption from competitive bidding authority for 'public safety radio services' includes 'private internal radio services' used by *utilities*, railroads, metropolitan transit systems, pipelines, private ambulances, and volunteer fire departments. Though private in nature, the services offered by these entities

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[17] *See Hernstadt v. FCC*, 677 F.2d 893, 894 (D.C. Cir. 1980).

[18] Section 337(f)(1) defines "public safety services" as services:

> (A) the sole or principal purpose of which is to protect the safety of life, health, or property;
>
> (B) that are provided—
>
> (i) by State or local government entities; or
>
> (ii) by nongovernmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and
>
> (C) that are not made commercially available to the public by the provider.

protect the safety of life, health, or property and are not made commercially available to the public." (Emphasis added.)[19] Moreover, during the Senate floor debate addressing a similar provision in the Senate's parallel version of the communications provisions of the Balanced Budget Act (hereinafter Senate floor debate), Senator Bryan noted that "[t]his legislation will expand the FCC's authority to auction spectrum, but not at the expense of entities [such as utilities] that we have entrusted to protect the safety of life, health and property and to provide essential public services."[20] As such, the legislative history conclusively shows that Congress intended to include utilities within the rubric of public safety radio services.

While the legislative history set forth above is enough to sustain NSP's position, it would additionally point to the expert testimony Congress had available during the drafting of the Balanced Budget Act. That testimony shows that Congress's decision to exempt utilities was well-informed. The Public Safety Wireless Advisory Committee ("PSWAC")

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[19] House Conf. Rep. at , reprinted in U.S.C.C.A.N. at 192.

[20] Congressional Record at S6325 (June 25, 1997). A parallel bill was introduced in the Senate by the Senate Committee on Budget, and debated on June 23, 24 and 25, 1997. 143 Cong. Rec. S6058 (daily ed. June 23, 1997); 143 Cong. Rec. S6015 (daily ed. June 24, 1997); 143 Cong. Rec. S6290 (daily ed. June 25, 1997). The Senate bill was amended during the floor debate to include the following additions to subsection (A), the parallel section to section (B) in the House bill:

> (2) EXEMPTIONS – The competitive bidding authority granted by this subsection shall not apply to licenses or construction permits issued by the Commission
>
> > (A) for public safety radio services, including private internal radio services used by *State and local governments and* non-Government entities, *including Emergency Auto Service by non-profit organizations* that –
> >
> > (i) *are used* protect the safety of life, health, or property; and
> >
> > (ii) are not made commercially available to the public;

S. 947, 105th Cong. (1997) (emphasis added).

published its final report on September 11, 1996. *Final Report of the Public Safety Wireless Advisory Committee to the Federal Communications Commission.* That report is referenced by witnesses in the Subcommittee hearings from which the communications provision of the Balanced Budget Act was born, and forms the background of information and expert recommendations available to Congress during drafting. *See, e.g., Oversight Hearing on Spectrum Management Policy Before the Subcomm. on Telecommunications, Trade, and Consumer Protection of the House Commerce Committee,* (statement of Reed E. Hundt, Chairman, FCC; statement of Michael Amorosa, Deputy Police Commissioner, Technology Development, New York City Police Department) (visited June 1, 1999) available at <http://www.house.gov/commerce/telecom/hearings/021297/witness.htm>.

Public safety and *public service entities* were the subject of focus for the PSWAC Subcommittee on Interoperability, which noted the vital nature of communications between and among both types of groups in the event of an emergency as well as in the day-to-day consistency of operations.[21] The Committee noted:

> Public service providers, such as transportation companies *and utilities* rely extensively on radio communications in their day-to-day operations which involve safeguarding safety and preventing accidents from occurring. These entities also play important roles in supporting first responders once an incident does occur. In all their operations, they have many of the same needs as Public Safety Agencies.

Id. (emphasis supplied).

Thus, the legislative history makes clear that utilities were intended to be included among the class of licensees encompassed by the statutory phrase "public safety radio services," and cannot be required to obtain MAS licenses through competitive bidding.

[21] PSWAC Final Report at 35.

B. The Nature of Utilities' Use of MAS Mandates the Application of the Public Safety Radio Services Exemption.

Utilities such as NSP use MAS to monitor and remotely control their power generation, storage, and distribution. Without it, they cannot monitor their systems for potential problems on a real-time basis or fix problems without sending out a crew. Obviously, it is critical for a power company to know immediately whether a line carrying electricity is overheating or to be able to quickly fix a problem located in a far-off, hard-to-reach area via a wireless transmitter. Other utilities use MAS in similarly vital ways. Oil and natural gas providers place MAS facilities in their production fields and distribution pipelines to monitor and control operating parameters, which in turn assists in meeting safety and environmental objectives. Water utilities employ systems that operate on the MAS bands and, through remote monitoring, handle essential tasks such as preventing system surges, service failures to users such as hospitals and industrial plants, and loss of water pressure.

As the foregoing shows, utilities' MAS is vital both for day-to-day operations and in times of crisis. Also, of course, functions provided by MAS clearly promote public safety. Our society is dependent upon utilities; when they fail virtually everything connected with them comes to a halt and local governments shift to crisis modes.

There is no reasonable basis upon which to argue that utilities utilizing MAS do not come within the definition of public safety services. A specific example is the way in which traditionally viewed public safety services, such as law enforcement, depend upon utilities. If law enforcement are included in the definition, should not the companies that provide their energy needs on a constant, on-going basis also be included? Certainly, law enforcement services would be significantly incapacitated in the event of a blackout.

Utilities rely on their MAS facilities to prevent those blackouts just as police officers rely on their private radio systems to respond to calls for help. Excluding law enforcement from auctions for spectrum licenses due to such reliance, but not excluding the energy providers without whom the law enforcement and fire and rescue services could not function, would make no sense.

Therefore, the nature of utilities' use of MAS spectrum compels the conclusion that they should be classified as public safety radio services and, thus, exempt from bidding on MAS licenses.

C. The FCC's Tentative Conclusions That MAS Spectrum for Certain Bands Should be Allocated Via Competitive Bidding are Based on Arguments Not Applicable to Utilities.

In Paragraph 19 of the FNPRM, the FCC tentatively concludes that the proposed and actual uses of the 932/941 MHz and 928/959 MHz bands for MAS services do not come within the public safety radio services exemption from competitive bidding because: (1) the majority of prior applications for those bands did not propose using the band's channels for providing pubic safety radio services; (2) the majority of prior applications proposed using the channels for a commercial nature; and (3) the FCC has never allocated such channels for public safety radio services. While those contentions may be fine in the context of commercial users of MAS, they do not carry any weight against non-commercial users such as utilities. Simply because non-commercial applicants for those bands are in the minority does not mean they should be foreclosed from seeking channels on them on an auction-exempt basis. Utilities are large users of MAS spectrum. They will need to secure more MAS licenses in the near future, and the availability of channels in other bands may run out. The 932/941 MHz and 928/959 MHz bands should not be

effectively closed to them by making them subject to auction for all users. Regardless of how many commercial users currently use those bands, utilities should still be deemed public safety radio services and thus exempt from auction when seeking channels in those bands in the future.

III. PORTIONS OF BANDS SHOULD BE RESERVED FOR PUBLIC SAFETY RADIO SERVICES, TO INCLUDE UTILITIES.

In Paragraph 20 of the FNRPM, the FCC seeks comment on whether part or all of the 928/952/956 MHz bands should be reserved exclusively for public safety radio services. Similarly, in Paragraph 22 of the FNRPM, the FCC seeks comment on whether it should retain a prior proposal to reserve five of the forty channel pairs in the 932/941 MHz bands exclusively for public safety/Federal Government use, and if so, whether such a reserve should encompass services that fall under the Balanced Budget Act's definition of public safety radio services.

With regard to the 928/952/956 MHz bands, NSP submits that the entire band should be allocated for licensing by public safety radio services and exempt from auction. Utility services should, of course, be deemed public safety radio services in any regulatory framework that is imposed. The 928/952/956 MHz bands need to be available for public safety radio services because, from the perspective of NSP, MAS users will need many additional licenses in the future to continue to support and grow their systems, and the pool of available spectrum must be as large as possible. The high growth rates of MAS used by private radio services is demonstrated by the large number of applications over the past several years. Also, by way of specific example, a power utility in Alabama currently has 105 MAS licenses, which is enough to barely support 1,500 remote units; it hopes to be fully automated by 2004 and estimates it will need enough MAS licenses to support 5,000

remote units. The critical nature of utilities to society mandates that there be sufficient channels for them to grow their infrastructure as needed. Allocating the entire 928/952/956 MHz bands for public safety radio services is an essential step toward assuring channel availability.

With regard to the 932/941 MHz bands, in accordance with the reasoning set forth above, NSP would urge the FCC to reserve not just five but twenty of the forty channel pairs in the 932/941 MHz bands exclusively for public safety radio services. For purposes of determining eligibility for the reserved spectrum, the preceding sections herein explain why "public safety radio services" as defined in the Balanced Budget Act's legislative history is a more appropriate threshold to use than the older, less inclusive definition of "public safety services" contemplated by the FCC's traditional categories.

IV. THE APPLICATION FREEZE MUST BE LIFTED FOR PUBLIC SAFETY SERVICES.

In Paragraphs 28 through 31 of the FNPRM, the FCC extended a previously adopted licensing freeze for MAS to include spectrum used primarily by NSP and similar utilities. NSP is aware that the FCC states in Paragraph 31 of the FNPRM that the freeze is not subject to comment. However, lifting the freeze for NSP and similar utilities is of such vital importance that it would respectfully request that the FCC give serious consideration to doing so.

As NSP has indicated throughout these comments, it uses MAS spectrum to support operations that provide critical services to the public. For example, such spectrum plays an integral role in the supervisory control and distribution automation ("SCADA") systems that manage the electric grid. The various applications deployed using MAS spectrum ensure the smooth delivery and operation of power services throughout America.

For preventing emergencies, and in case of emergencies, these services are nothing short of critical. Consequently, public safety radio service licensees must have the ability to modify existing MAS licenses or file for new MAS spectrum to support their core business functions. Any application freeze would work against this important need and may place the FCC in the position of having adopted rules that endanger the public.

Also, the freeze serves no purpose with regard to utilities such as NSP. As explained above, NSP's and similar utilities' use of MAS falls under the public safety radio services exemption. As such, those utilities will not be subject to competitive bidding for MAS spectrum when the FCC ends the freeze. Because, as the FCC notes in the FNPRM, the expanded freeze is necessary due to the "uncertainty regarding whether to employ geographic area licensing and auctions for these bands," the reasoning for the expanded freeze has no application to utilities which will not be subject to auctions. Thus, continuing the freeze on such utilities makes little sense.

Even assuming that a short freeze would not hurt utilities – a position that is impossible to support – past precedent suggests that application freezes last much longer than the FCC has historically anticipated. For example, applications were frozen in anticipation of auctions for Location and Monitoring,[22] Interactive Video Data Services, and Local Multipoint Distribution Services. In these and other cases, short freezes intended to allow the agency and the public time to formulate rules and raise capital turned into freezes lasting years. During this time, spectrum laid fallow and potential participants abandoned business plans. Because the FCC's ability to issue rules or initiate auctions is affected by intervening events such as staffing shortages, proceeding reprioritization, or

[22] This freeze lasted nearly four years.

petitions for reconsideration or court review, the best intentions to auction spectrum quickly are frequently waylaid. Because of the important applications supported by private land mobile and microwave spectrum, the risk of a protracted application freeze is too great to accept.

Additionally, allowing only utilities to obtain spectrum during the freeze would not frustrate the FCC's goals in enacting the freeze, such as discouraging speculation. The likelihood that any utility would convert itself into a spectrum speculator and obtain channels with no intent to construct but only to sell the frequencies is virtually nil; it is certainly not something NSP would do.

Therefore, the FCC should lift the freeze for public safety service entities.

CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Northern States Power respectfully asks the Commission to act in the public interest in accordance with the proposals set forth herein.

Respectfully submitted,

Carole C. Harris
McDermott, Will & Emery
600 13th Street, N.W.
Washington, D.C. 20005

Attorney for Northern States Power Company

Dated: September 17, 1999

CERTIFICATE OF SERVICE

I, Christine S. Biso, do hereby certify that on this 17th day of September 1999, a copy of the foregoing "Comments of Northern States Power Company" was hand-delivered to each of the following:

Magalie R. Salas (Original and 4 Copies)
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, DC 20554

Gloria Tristani, Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-C302C
Washington, D.C. 20554

William E. Kennard, Chairman
Federal Communications Commission
445 12th Street, S.W., Room 8-B201H
Washington, D.C. 20554

Policy and Rules Branch (Diskette)
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W., Room 4-C330
Washington, D.C. 20554

Michael Powell, Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-A204C
Washington, D.C. 20554

Thomas J. Sugrue
Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Room 3-C207
Washington, D.C. 20554

Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-A302C
Washington, D.C. 20554

Ronald E. Quirk, Jr.
Public Safety and Private Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, S.W., Room 4C-405
Washington, D.C. 20554

Susan Ness, Commissioner
Federal Communications Commission
445 12th Street, S.W., Room 8-B115H
Washington, D.C. 20554

International Transcription Service
445 12th Street, S.W.
Room CY-B400
Washington, D.C. 20554

By: Christine S. Biso
Christine S. Biso